

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 RAINBOW BUSINESS SOLUTIONS,
5 d/b/a PRECISION TUNE AUTO
6 CARE, et al.,

7 Plaintiffs,

8 v.

9 MERCHANT SERVICES, INC., et
10 al.,

11 Defendants.

Case No. 10-cv-01993-CW

ORDER DENYING UNIVERSAL CARD,
INC.'S MOTION TO ENFORCE
SETTLEMENT AGREEMENT AND TO
PERMANENTLY ENJOIN STATE
COURT COUNTERCLAIMS

(Dkt. No. 694, 695)

12 Former Defendant Universal Card, Inc., moves to enforce a
13 settlement agreement and permanently enjoin counterclaims brought
14 in a New York state court lawsuit by an individual named Michael
15 A. Han. Han and Plaintiffs oppose the motion. Defendants
16 Northern Leasing Systems, Inc., MBF Leasing, LLC (MBF), Northern
17 Funding, LLC, SKS Associates, LLC, Jay Cohen, Sara Krieger,
18 Leonard Mezei and Sam Buono (Leasing Defendants) filed a
19 memorandum in support of the motion. Universal Card filed a
20 reply. Universal Card, Han, Plaintiffs, and Leasing Defendants
21 also filed supplemental briefs on a jurisdictional question posed
22 by the Court. Having considered the parties' papers, the record
23 and applicable authority, the Court denies Universal Card's
24 motion.

25 BACKGROUND

26 In this action, Plaintiffs allege that Merchant Services
27 Defendants, including Universal Card, Inc., conspired with
28 Leasing Defendants, including MBF, to enroll small businesses in

1 long term, unconscionable lease agreements for payment card
2 processing equipment and services. Plaintiffs further allege
3 that, when merchants stopped making payments under those leases,
4 MBF filed debt collection lawsuits in New York, without regard to
5 the merchant's location.

6 Merchant Services Defendants reached a settlement with
7 Plaintiffs. See Settlement Agreement, Dkt. No. 519, Ex. 1.¹ On
8 December 11, 2013, the Court granted final approval of the
9 settlement. The settlement included a release of claims between
10 the settlement class members and Merchant Services Defendants,
11 which provided, in relevant part:

12 Release Regarding Settlement Class Members and Released
13 Parties. Upon Final Approval, the members of the
14 Settlement Class (except any such person who has filed
15 a proper and timely request for exclusion from the
16 Settlement Class) shall release and forever discharge
17 the Released Parties from and shall be forever barred
18 from instituting, maintaining, or prosecuting:

19 (a) any and all claims, liens, demands, actions, causes
20 of action, obligations, damages or liabilities of any
21 nature whatsoever, known or unknown, whether arising
22 under any international, federal, state or local
23 statute, ordinance, common law, regulation, principle
24 of equity or otherwise, that actually were, or could
25 have been, asserted in the Litigation related in any
26 manner to the allegations set forth in the Complaint,
27 which are summarized in section 1.4; . . .

28 (e) No release is given by Plaintiffs or Settlement
Class Members to the Non-Released Parties.

Id. § 8.3 (emphasis added). The parties agreed that the release
would be binding upon their respective "successors and personal
representatives." Id. § 8.3(c). The settlement agreement

¹ In this order, except where otherwise indicated, references
to the settlement agreement relate to the 2013 Merchant Services
Settlement Agreement, Dkt. No. 519, Ex. 1. References to the
2017 Leasing Defendants Settlement Agreement, Dkt. No. 684-3, are
specifically noted.

1 further included the following definitions:

2 "Non-Released Parties" means the Northern Leasing
3 Parties, RBL Capital Group, LLC; William Healy;
4 TransFirst Holdings, Inc.; TransFirst, LLC; TransFirst
5 Third Party Sales, LLC; Columbus Bank And Trust Co.;
6 Fifth Third Bank; Merrick Bank; and all of their past
and present officers, directors, parents, subsidiaries,
successors, predecessors, assigns and legal
representatives. . . .

7 "Northern Leasing Parties" means Northern Leasing
8 Systems, Inc.; MBF Leasing LLC; Northern Funding LLC;
9 Golden Eagle Leasing LLC; Lease Source-LSI, LLC; Lease
10 Finance Group, LLC; Jay Cohen; Leonard Mezei; Sara
Krieger; Brian Fitzgerald; Sam Buono; MBF Merchant
Capital, LLC; Joseph I. Sussman; Joseph I. Sussman,
P.C.; SKS Associates, LLC; Pushpin Holdings, LLC; and
Cucumber Holdings, LLC. . . .

11 "Released Parties" means all of the Settling
12 Defendants, and all of Settling Defendants' past and
13 present officers, directors, parents, subsidiaries,
14 successors, predecessors, agents, assigns, and legal
representatives. However, even if they would otherwise
be included in the above definition, "Released Parties"
excludes the Non-Released Parties.

15 Id. §§ 2.17, 2.20, 2.27 (emphasis added).

16 Plaintiffs continue to pursue claims in this action against
17 the non-released parties. The Court granted a motion for
18 preliminary approval of a settlement between Plaintiffs and
19 Leasing Defendants on August 3, 2017, and a final approval
20 hearing is scheduled for November 28, 2017.

21 One of the 2013 settlement class members was a company
22 called WRS, Inc. dba The Wedding Ring Shop (WRS). In August
23 2009, MBF filed an action in the Civil Court of the City of New
24 York, County of New York against Han. MBF alleged that it had
25 entered into an equipment finance lease agreement with WRS,
26 "payment on which was personally guaranteed by" Han. Universal
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1 Card RJN ¶ 2 & Ex. C, ¶ 2.² It alleged that WRS had failed to
2 make its required monthly payments and Han therefore owed the
3 balance, with interest, by reason of his personal guarantee.
4 Neither Universal Card nor WRS was a party to the action. Han
5 filed a verified answer and counterclaims, raising claims similar
6 to those in this action. Almost eight years later, in June 2017,
7 MBF filed a third party complaint in the same court against
8 Universal Card and its alleged employee Tina Marie Shorter,
9 seeking indemnification with regard to Han's counterclaims
10 against MBF. Universal Card has submitted evidence that it was
11 not aware of the dispute between Han and MBF until MBF demanded
12 indemnification. Nathan Jurczyk Decl. ¶ 5.

13 DISCUSSION

14 In its motion, Universal Card contends that, even though MBF
15 is a non-released party in the 2013 Merchant Services settlement,
16 Han's New York counterclaims are premised on Universal Card's
17 alleged misconduct in procuring the WRS lease. It contends that
18 the 2013 release in this action extended not only to the released
19 parties such as Universal Card, but to all claims, against
20 anyone, that could have been or actually were brought in this
21 action and are related in any way to the settled claims. Thus,
22 it argues, Han's claims are barred by the release and by the
23 doctrine of claim preclusion. It requests that this Court
24 permanently enjoin Han from pursuing his state court
25 counterclaims.

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28 ² The Court grants Universal Card's request for judicial
notice of various documents filed in New York state court.

1 I. The Court Has Jurisdiction over the Motion to Enforce.

2 Universal Card contends that this Court has jurisdiction to
3 grant its requested relief because the Court expressly retained
4 jurisdiction over enforcement of the settlement. See Kokkonen v.
5 Guardian Life Ins. Co. of Am., 511 U.S. 375, 381-82 (1994)
6 (holding that federal court may not enforce settlement agreement
7 absent language in agreement retaining jurisdiction or
8 independent basis for federal jurisdiction). Two paragraphs of
9 the Court's December 11, 2013 Order Granting Motion for Final
10 Approval of Class Action Settlement and Judgment are relevant to
11 the Court's continuing jurisdiction. Paragraph 14 provides,
12 "Nothing herein shall bar any action or claim to enforce the
13 terms of the Settlement Agreement." Paragraph 18 provides,
14 "Without affecting the finality of the judgment hereby entered,
15 the Court reserves jurisdiction over the implementation of the
16 Settlement Agreement." In the settlement agreement, the parties
17 agreed that the "Court shall retain jurisdiction to enforce,
18 interpret, and implement this Agreement." Settlement Agreement
19 § 9.13.

20 The Court directed the parties to file simultaneous
21 supplemental briefs addressing whether the language of the
22 settlement agreement and final approval order preserved this
23 Court's jurisdiction to enforce the release in the agreement. In
24 particular, the Court ordered that the supplemental briefs should
25 address whether the provision reserving jurisdiction over
26 "implementation" of the settlement agreement also extends to
27 "enforcement," in light of the separate provision that the
28 agreement does not bar (rather than reserves jurisdiction over),

1 actions to "enforce" the agreement.

2 The authority submitted by the parties does not squarely
3 address the language of the settlement agreement here, although
4 it suggests that some courts have used the words "implement" and
5 "enforce" interchangeably. See, e.g., In re Prudential Ins. Co.
6 of Am. Sales Practice Litig., 261 F.3d 355, 367 (3d Cir. 2001)
7 (appellate court held that "district court expressly retained
8 exclusive jurisdiction to oversee the implementation of the
9 settlement and the judgment" but district court order actually
10 retained "exclusive jurisdiction as to all matters relating to
11 administration, consummation, enforcement and interpretation")
12 (citing In re Prudential Ins. Co. of Am. Sales Practices Litig.,
13 962 F. Supp. 450, 566 (D.N.J. 1997)); California River Watch v.
14 Fluor Corp., No. 10-cv-05105-WHO (JCS), 2017 WL 1208067, at *1
15 (N.D. Cal. Apr. 3, 2017) (court referred to its continuing
16 jurisdiction over implementation, but settlement agreement and
17 order of dismissal had retained jurisdiction over enforcement).

18 In its own final approval order, the Court did not intend to
19 narrow the provision in the settlement agreement retaining
20 jurisdiction. Plaintiffs have informed the Court that any
21 apparent narrowing of the jurisdictional provision in the
22 proposed final approval order was inadvertent.

23 The Court has broad discretion to determine when to
24 terminate its continuing jurisdiction over a settlement agreement
25 after the parties have satisfied their obligations under the
26 agreement and the exercise of jurisdiction is no longer
27 necessary. See Arata v. Nu Skin Int'l, Inc., 96 F.3d 1265, 1269
28 (9th Cir. 1996). The Court finds that it is not presently

1 appropriate to terminate its continuing jurisdiction over this
2 settlement, because Universal Card contends that the release has
3 not yet been fully implemented and enforced.³

4 The Court finds that the express language of the order is
5 sufficient to retain the Court's jurisdiction to enforce the
6 settlement agreement, and turns to the question of Universal
7 Card's motion for enforcement.

8 II. The Merchant Services Settlement Agreement Does Not Bar
9 Han's Counterclaims against MBF.

10 Universal Card argues that Han's counterclaims against MBF
11 in the New York action are barred by the express language of the
12 Merchant Services settlement agreement, and by the doctrine of
13 res judicata, otherwise known as claim preclusion. Universal
14 Card concedes that MBF was not a released party in the Merchant
15 Services settlement. It contends, however, that "the release is
16 not only as to the released parties, including Universal, but
17 also as to all claims that could have been or were actually
18 brought in this action related in any way to the settled claims."
19 Opp. at 14. In other words, it argues that the class members
20 released claims against the entire world, including parties such
21 as MBF that were expressly excluded from the release. It bases
22 this argument on the language of section 8.3 of the settlement
23 agreement, which states that the members of the settlement class
24 release and discharge the released parties from "and shall be
25 forever barred from instituting, maintaining, or prosecuting" any

26 ³ The Court notes that Universal Card provides no support for
27 its claim that this Court has exclusive jurisdiction to enforce
28 the settlement agreement. For the purpose of the present motion,
however, it is enough to find that the Court has jurisdiction,
even if other courts do as well.

1 claims related to the allegations of the Complaint that were, or
2 could have been, asserted in this litigation. Settlement
3 Agreement § 8.3 (emphasis added). Universal Card's position is
4 that the word "and" in section 8.3 means that the bar on bringing
5 related claims is not limited to claims against the released
6 parties.

7 Universal Card's argument is contrary to the plain language
8 of the agreement, which expressly and repeatedly provides that no
9 release is given to the defined non-released parties. See, e.g.,
10 Settlement Agreement §§ 2.27, 8.3(e). It would render
11 meaningless the first half of the relevant sentence in section
12 8.3 of the settlement agreement, which provides that settlement
13 class members "shall release and forever discharge the released
14 parties from" the enumerated claims, because this narrowed
15 language would be wholly subsumed in the broader language of the
16 supposed release of the entire world. It also makes no sense in
17 light of the fact that Plaintiffs have continued to pursue such
18 claims against the non-released parties in this very action.
19 See, e.g., Leasing Defendants Settlement Agreement, §§ 1.5, 8.2,
20 Dkt. No. 684-3.

21 Because the Merchant Services settlement agreement did not
22 release any claims against MBF, Han's counterclaims are not
23 barred by claim preclusion. Settling parties may waive or limit
24 the effect of res judicata by consent, as they did here. See,
25 e.g., California v. Randtron, 284 F.3d 969, 975 (9th Cir. 2002)
26 (quoting United States ex rel. Barajas v. Northrop Corp.,
27 147 F.3d 905, 911 (9th Cir. 1998) ("A settlement can limit the
28 scope of the preclusive effect of a dismissal with prejudice by

1 its terms.")); Perez v. Gordon & Wong Law Grp., P.C., No. 11-cv-
2 03323-LHK, 2012 WL 1029425, at *4 (N.D. Cal. Mar. 26, 2012) (It
3 "is well settled under California law in the context of consent
4 decrees, stipulated judgments, and court-approved class action
5 settlements that when 'applying the doctrine of res judicata,
6 courts may examine the terms of the settlement to ensure that the
7 defendant did not waive res judicata as a defense.'").

8 Additionally, MBF and Universal Card are not in privity
9 either in connection with their interests in this lawsuit or in
10 the New York lawsuits. The contractual relationship between MBF
11 and Universal Card, the fact that both were Defendants in this
12 lawsuit and MBF's attempt to seek indemnification from Universal
13 Card are not sufficient to support a finding of privity. For the
14 purpose of the privity analysis, "only the parties' relationship
15 with respect to the relevant lawsuits matters." SpeedTrack, Inc.
16 v. Office Depot, Inc., No. C 07-3602 PJH, 2014 WL 1813292, at *6
17 (N.D. Cal. May 6, 2014) (citing Transclean Corp. v. Jiffy Lube
18 Int'l, Inc., 474 F.3d 1298, 1306 (Fed. Cir. 2007) ("privity
19 exists when the parties are so closely related and their
20 interests so nearly identical that it is fair to treat them as
21 the same parties for the purposes of determining the preclusive
22 effect of the first judgment"); In re Schimmels, 127 F.3d 875,
23 881 (9th Cir. 1997) ("Privity--for the purposes of applying the
24 doctrine of res judicata--is a legal conclusion designating a
25 person so identified in interest with a party to former
26 litigation that he represents precisely the same right in respect
27 to the subject matter involved.")).

28 In this action, as discussed, Merchant Services Defendants

1 (including Universal Card) and Leasing Defendants (including MBF)
2 negotiated separate settlement agreements expressly involving
3 separate releases, and only the Merchant Services settlement has
4 been granted final approval by the Court so far.

5 Likewise, in New York, MBF and Universal are adversaries in
6 the third-party indemnity litigation. MBF apparently did not
7 even notify Universal Card of Han's counterclaims for many years,
8 until it decided to sue Universal Card to enforce its alleged
9 right to indemnification. Also, MBF has taken the position in
10 the New York litigation that it is not in privity with Universal
11 Card. See, e.g., Universal Card RJN Ex. D (Third Party
12 Complaint), ¶ 16 ("As is typical in any vendor lease financing
13 program agreement between an equipment lessor such as MBF and a
14 Vendor such as Universal, the Program Agreement expressly states
15 that Universal 'understands that it is not an agent for MBF and
16 [that] this agreement does not confer upon it any powers of an
17 agent.'" (citing MBF Program Agreement ¶ 6(d)) (alteration in
18 original); Han Ex. 4 (Lina Kravic Decl. on behalf of Northern
19 Leasing Systems, Inc.), ¶ 19 (Universal Merchant Services and MBF
20 "are wholly unaffiliated and independent entities that do not
21 share any principles [sic], directors or employees in common.
22 MBF's relationship with Merchant Services is governed strictly by
23 the Program Agreement which the parties negotiated at arms-
24 length."). This further supports the finding that MBF and
25 Universal are not in privity for the purpose of res judicata in
26 this case.

27 The Court also finds that Universal Card has not shown that
28 WRS is the real party in interest in the New York action, where

1 MBF expressly alleged claims against Han as a guarantor rather
2 than in his capacity as an officer or agent of WRS.

3 In light of the Court's conclusion that MBF and Universal
4 are not in privity, and res judicata does not apply, the Court
5 need not consider whether Han and WRS are in privity. Because
6 the New York counterclaims are brought against non-released party
7 MBF rather than against Universal Card, Universal Card's motion
8 to enforce the settlement must be denied regardless of the role
9 of WRS in the New York lawsuit.

10 CONCLUSION

11 For the foregoing reasons, the Court DENIES Universal Card's
12 motion to enforce the settlement agreement and permanently enjoin
13 Han's state court counterclaims (Docket No. 694).

14 The Court GRANTS Universal Card's request for judicial
15 notice (Docket No. 695).

16 IT IS SO ORDERED.

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18 Dated: October 24, 2017



19 CLAUDIA WILKEN
20 United States District Judge
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